

Staff Memorandum 2023-01

Updates on Recent Law Changes and Related Matters

At its March 2023 meeting, the Committee on Revision of the Penal Code will consider recent changes to California's criminal law, with a focus on sentencing reforms. The goal of the meeting is to evaluate the effectiveness of the reforms and explore additional recommendations for changes to the Penal Code.

Introduction

This memorandum focuses on selected changes to the Penal Code that became effective in roughly the last five years. It divides the laws into three groups – judicial discretion at sentencing, resentencings, and other laws, which includes felony murder, gang enhancements, and the Racial Justice Act. (A one-page summary of these laws is included as an Appendix.)

Relevant data is part of the discussion below, but the data is preliminary and does not give a complete picture of the impact of the changes in law. For example, there is more work to be done to examine how racial disparities are affected by the laws discussed here, impacts on public safety, and, for changes related to sentence enhancements, whether total sentence length has been meaningfully affected. Additional analysis will be developed in collaboration with the California Policy Lab.

Despite these limitations, some trends do emerge. The reforms discussed in this memorandum were largely driven by the same goals the Committee has of improving public safety and equity while reducing racial disparities and unnecessary incarceration. Many of the laws discussed below have begun to accomplish those goals.

Overview of Law Changes

Judicial Discretion in Sentencing

1. Determinate sentencing presumptions

Code Sections

Penal Code § 1170

Relevant Bill

SB 567 (2021 Bradford)

Overview

Beginning in 2022, the middle term in a sentencing triad – the set of three possible terms of imprisonment specified in the law for an offense punishable

with a determinate sentence — is the presumptive sentence.¹ The upper term can only be imposed if a person admits at a guilty plea or a jury finds “circumstances in aggravation.”² When specified mitigating circumstances are present and not outweighed by aggravating circumstances, courts are directed to impose the low term.³ A defendant can also request a bifurcated proceeding on the aggravating circumstances, meaning a jury cannot hear about them until after conviction of the underlying offense.⁴

Recent Developments

Mitigating circumstances — including psychological, physical, or childhood trauma or the person being under 26 at the time of the offense⁵ — that require imposition of the low term are specified in the law, but “circumstances in aggravation” are not.⁶

Because the aggravators are not defined in statute, some prosecutors and trial courts are relying on the set of aggravating factors in the Rules of Court.⁷ Yet these factors were originally designed as broad guidance for judges, not as precise elements for juries to use to find guilt beyond a reasonable doubt.⁸ Some of these factors have never been meaningfully considered by the courts and may be too ambiguous for a jury to consider consistent with due process.⁹ For example, the Rules of Court aggravators include whether a victim was “particularly vulnerable,” the crime involved stealing or damaging something of “great” monetary value or involved a “large” quantity of contraband, or was accomplished with an act “disclosing a high degree of cruelty, viciousness, or callousness.”¹⁰

¹ Penal Code § 1170(b)(1). A presumption for the middle term was the law until 2007 when the Legislature gave courts total discretion in deciding whether the low, middle, or high term was appropriate. See generally SB 40 (2007 Romero). This action was taken in response to the United States Supreme Court’s decision in *Cunningham v. California*, 549 U.S. 270 (2007), which held that California’s determinate sentencing scheme violated the Sixth Amendment by allowing a judge to impose a high term based on facts not found by a jury or admitted by the defendant.

² Penal Code § 1170(b)(2).

³ Penal Code § 1170(b)(6).

⁴ Penal Code § 1170(b)(2).

⁵ Penal Code § 1170(b)(6)(A) & (B).

⁶ Penal Code § 1170(b)(2).

⁷ California Rules of Court, Rule 4.421.

⁸ For example, in *People v. Lewis*, – Cal.Rptr.3d –, 2023 WL 2325182 (March 2, 2023), an appellate court recently noted that the aggravating circumstance of “violent conduct that indicated a serious danger to society” is “vague and subjective” and the court could not assess what facts constituted the aggravating circumstance.

⁹ See *People v. Sandoval*, 41 Cal.4th 825, 840 (2007) (Rule 4.421 factors “are framed more broadly than criminal statutes and necessarily partake of a certain amount of vagueness which would be impermissible if those standards were attempting to define specific criminal offenses.” (citation and quotation marks omitted)).

¹⁰ California Rules of Court, Rule 4.421(a)(3), (9), (10), (1).

2. Guidance on judicial discretion to strike enhancements

Code Sections

Penal Code § 1385

Relevant Bill

SB 81 (2021 Skinner)

Overview

Penal Code § 1385 has long allowed judges to dismiss sentence enhancements “if it is in the furtherance of justice to do so.”¹¹ Based on a recommendation from the Committee, SB 81 created guidance for judges when exercising this discretion. The law lists nine mitigating circumstances — including multiple enhancements in a single case and an enhancement based on a prior conviction that is over 5 years old¹² — any of which “weigh[] greatly in favor of dismissing the enhancement” unless the court finds that “dismissal of the enhancement would endanger public safety.”¹³

Recent Developments

The amendments to Penal Code § 1385 have only been in effect since January 2022, but a number of appellate courts have already begun to address them:

- Two of the mitigating circumstances specify that an enhancement “shall” be dismissed.¹⁴ Every appellate decision to directly address this issue has concluded that a trial court is not required to dismiss when these mitigating circumstances are present and instead retains its discretion on whether to dismiss the enhancements.¹⁵
- Appellate courts conflict about how trial judges are to give “great weight” to the mitigating factors. One court has held that dismissal is required unless the judge concludes that public safety would be endangered,

¹¹ Penal Code § 1385(c)(1). See generally *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996).

¹² Penal Code § 1385(c)(2)(B) & (H).

¹³ The law further specifies that “‘Endanger public safety’ means there is a likelihood that the dismissal of the enhancement would result in physical injury or other serious danger to others.” Penal Code § 1385(c)(2).

¹⁴ Penal Code §§ 1385(c)(2)(B) (“Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.”) & (C) (“The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.”).

¹⁵ See, e.g., *People v. Walker*, 86 Cal.App.5th 386, 400 (Second Appellate District 2022); *People v. Lipscomb*, 87 Cal.App.5th 9, 21 (First Appellate District 2022) (holding that dismissal of an enhancement is not mandatory in every circumstance in which it would result in a sentence over 20 years).

tracking the plain language of SB 81.¹⁶ But another court has said that trial judges may refuse to dismiss enhancements despite the presence of one of the specified mitigating factors for non-public safety related reasons.¹⁷

3. Restoration of judicial discretion to dismiss the five-year “nickel” prior

Code Sections

Penal Code § 667

Relevant Bill

SB 1393 (2018 Mitchell)

Overview

In 1982, Proposition 8 created a sentence enhancement that added five years to the sentence of anyone convicted of a “serious” offense who has a prior conviction for a serious offense.¹⁸ This so-called “nickel prior” enhancement was originally subject to dismissal by a judge in the interests of justice, but that sentencing discretion was removed by the Legislature in 1986.¹⁹ Beginning in 2019, SB 1393 restored courts’ power to dismiss the nickel prior.

¹⁶ *People v. Walker*, 86 Cal.App.5th 386, 400 (Second Appellate District 2022).

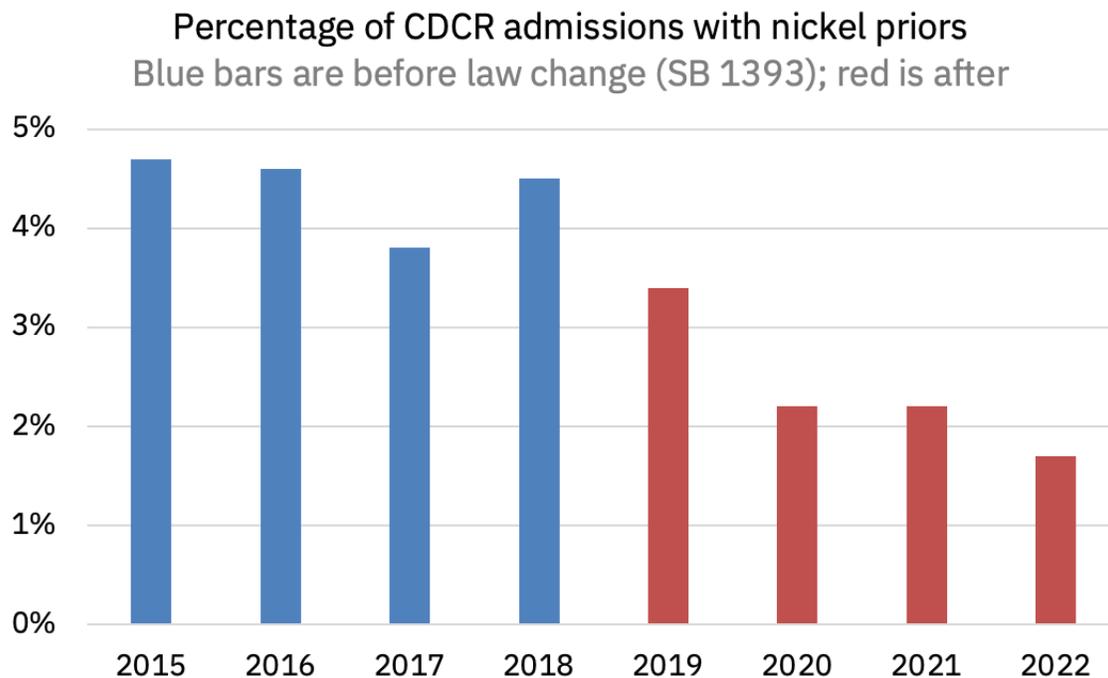
¹⁷ *People v. Ortiz*, 304 Cal.Rptr.3d 251, 259 (Sixth Appellate District 2023) (“[W]e respectfully decline to follow *Walker* ... [instead,] a trial court [may] determin[e] that countervailing factors — other than the likelihood of physical or other serious danger to others — may nonetheless neutralize even the great weight of the mitigating circumstance, such that dismissal of the enhancement is not in furtherance of justice.”).

¹⁸ Penal Code § 667(a)(1). The list of “serious” offenses is in Penal Code § 1192.7(c). The “violent” offenses from Penal Code § 667.5(c) are generally also “serious” ones.

¹⁹ See California Statutes of 1986, Chapter 85 (amending Penal Code § 1385 and abrogating *People v. Fritz*, 40 Cal. 3d 227 (1985), which allowed dismissal of the enhancement under Penal Code § 1385).

Recent Developments

As the below graphic shows, from 2015 to 2018, around 4.5% of all admissions to CDCR had a nickel prior enhancement. After the restoration of judicial discretion to dismiss the enhancement in 2019, the share of admissions dropped to 3.4% and continued dropping, with only 1.7% of admissions having a nickel prior in 2022. Though other factors may have caused this decline, the restoration of judicial discretion appears to be associated with a drop in the number of nickel priors imposed on people sentenced to prison.



Source: California Policy Lab analysis of data provided by CDCR.

4. Judicial discretion to dismiss certain firearms enhancements

Code Sections

Penal Code §§ 12022.5 (firearm “use” enhancement); 12022.53 (“10-20-life” firearm enhancement for specified offenses)

Relevant Bills

SB 620 (2017 Bradford)

Overview

California has a variety of firearms enhancements that can lengthen a sentence when a gun is involved in an offense.²⁰ Until 2018, judges were prohibited from

²⁰ See, e.g., Penal Code §§ 12022(a)(1) (“armed” enhancement adds 1 year); 12022.3(b) (using a firearm during certain sex offenses adds 1, 2, or 5 years).

using their discretion to dismiss two of the most frequently imposed firearm enhancements: the “10-20-life” firearm enhancement and the general firearm enhancement in Penal Code § 12022.5.

The 10-20-life law can add 10 or 20 years to a sentence or make it an indeterminate life term for certain offenses, including robbery and some sex offenses.²¹ The Legislature created this enhancement in 1997 and, until SB 620, judges never had the power to dismiss it.²²

The general firearm enhancement in Penal Code § 12022.5 allows 3, 4, or 10 years to be added to a sentence for any felony — not just a specified subset as with the 10-20-life gun law.²³ It also allows 5, 6, 10 if an assault weapon was used.²⁴ This enhancement, which was part of the 1976 Determinate Sentencing Act, originally imposed an additional 2 years and judges had the discretion to dismiss it until 1990.²⁵

Recent Developments

The below graphics show the percentage of admissions to CDCR with each of the two firearm enhancements affected by SB 620. The number of people entering state prison with these enhancements after SB 620 became effective do not show a clear pattern of increased or decreased usage following the restoration of judicial discretion. Further research — including whether the time added to a sentence by these gun enhancements changed, whether racial disparities were affected, and whether national trends in gun violence in 2021 and 2022²⁶ increased usage of the enhancement — would be instructive.

²¹ Penal Code § 12022.53.

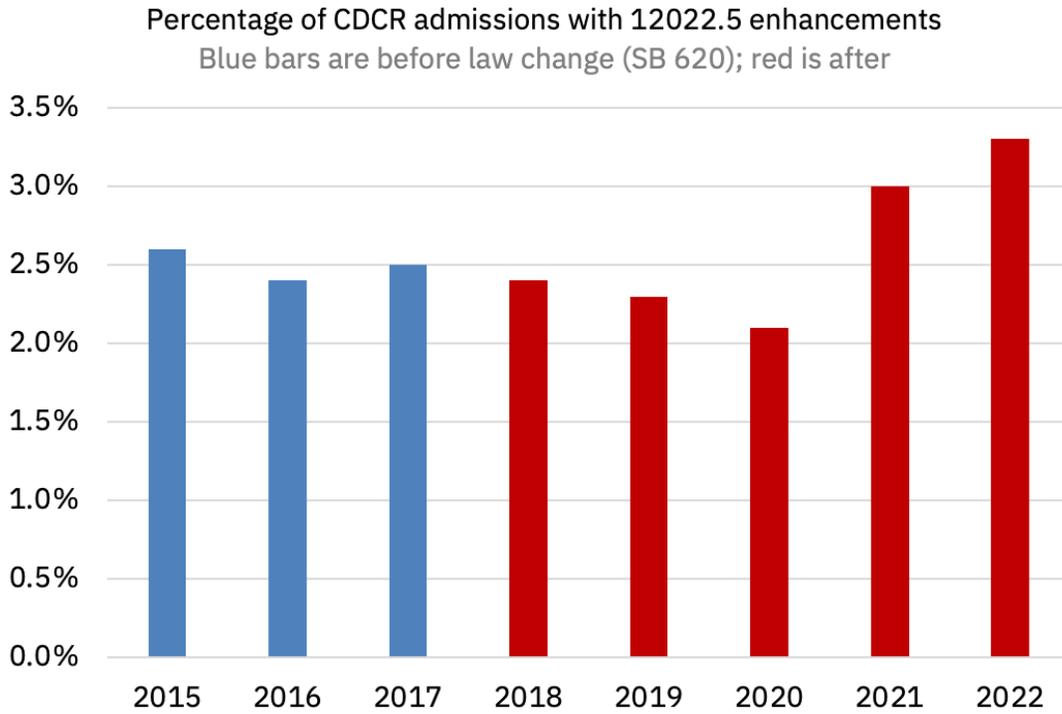
²² See AB 4 (1997 Bordnoaro).

²³ Penal Code § 12022.5(a).

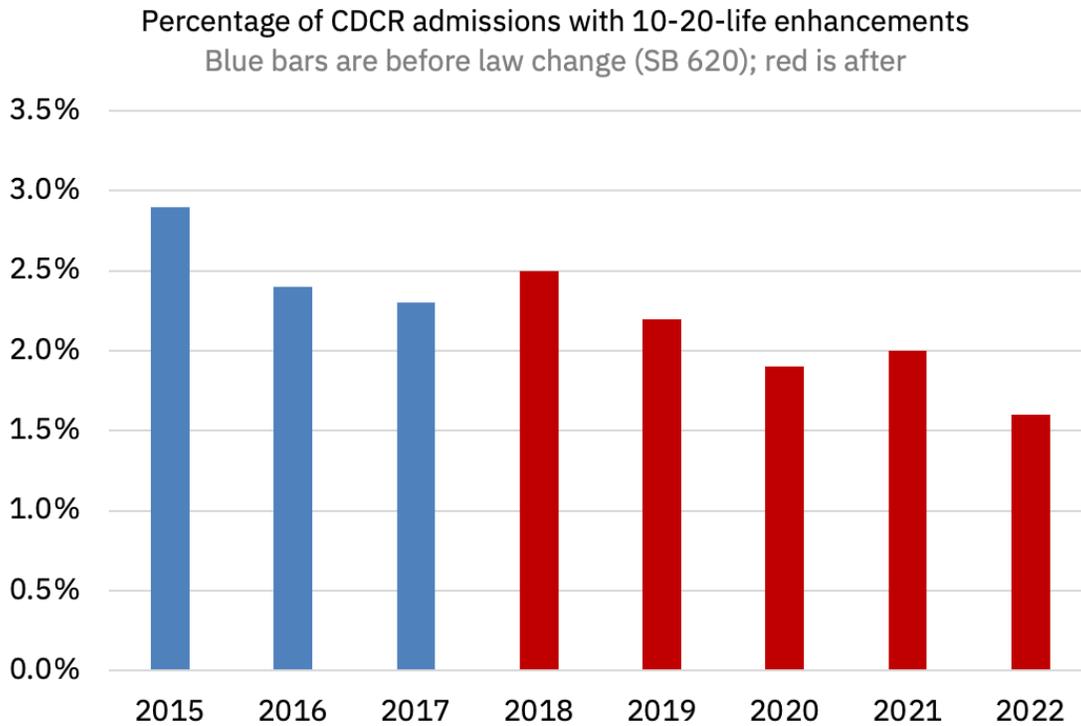
²⁴ Penal Code § 12022.5(b).

²⁵ See *People v. Ledesma*, 16 Cal. 4th 90, 96 (1997). In 1992, the California Supreme Court held that trial judges did not have the discretion to dismiss this enhancement because the Legislature had removed it from a list in Penal Code § 1170.1(h) of enhancements that could be dismissed. See *People v. Thomas*, 4 Cal.4th 206 (1992) (interpreting the effect of AB 566 (1989 McClintock)). Ten years later, the Legislature amended § 12022.5 to further specify that a judge had no discretion to dismiss this enhancement. See *People v. Gonzalez*, 43 Cal.4th 1118, 1125 (2008) (describing the history of AB 2173 (2002 Wayne)).

²⁶ See Chip Brownlee, *Gun Violence in 2022, By the Numbers*, The Trace, December 30, 2022.



Source: California Policy Lab analysis of data provided by CDCR.



Source: California Policy Lab analysis of data provided by CDCR.

Resentencing Provisions

1. Prosecutor and CDCR-initiated second-look resentencings

Code Sections

Penal Code § 1172.1

Relevant Bills

AB 1812 (2018 Committee on Budget); AB 2942 (2018 Ting); AB 1540 (2021 Ting); Budget Act of 2021

Overview

For decades, CDCR has had authority to recommend people for resentencing, including long after their case has become final.²⁷ In 2019, prosecutors were given this same power, courts were given further direction on what to consider in resentencings, and CDCR's funding for referrals was expanded.

In 2022, based on a recommendation from the Penal Code Committee, improvements to procedural rules for these second-look resentencings became effective, including assignment of counsel, mandatory hearings, and a presumption in favor of resentencing.

In addition, the Budget Act of 2021 created the California County Resentencing Pilot Program. This three-year project funded district attorney and public defender offices to support prosecutorial resentencing in 9 counties, with evaluations of the resentencing process to be performed by the RAND Corporation.

Recent Developments

CDCR has recommended more than 2,000 people for resentencing since 2018.²⁸ CDCR does this for two primary reasons: (1) a sentence might be affected by changes in sentencing law, even if those laws are not technically retroactive, and (2) the person has exhibited “extraordinary conduct” which the Secretary of CDCR has decided warrants resentencing.²⁹ In 2020 and 2021, CDCR also made a number of referrals to help reduce the population in response to the COVID-19 pandemic.

²⁷ See *People v. Dix*, 53 Cal.3d 442, 455 (1991) (CDCR's ability to request resentencing was part of the original Determinate Sentencing Act from 1976).

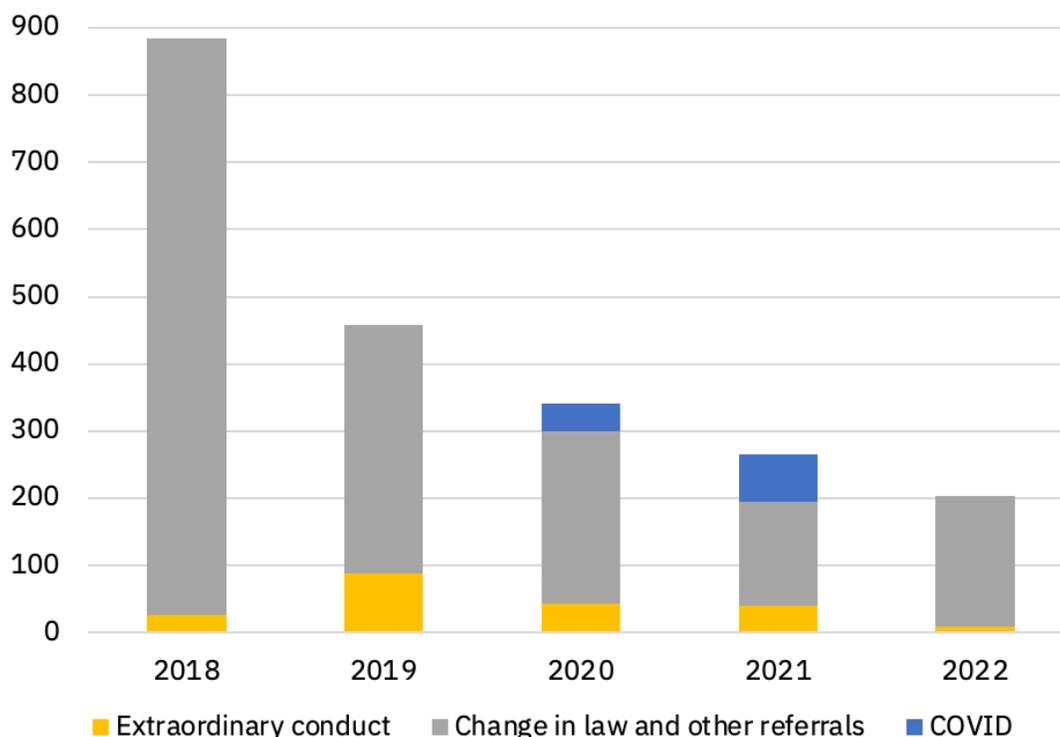
²⁸ The data referenced in this section is regularly provided by CDCR to advocates and other members of the public. CDCR provides a tracking log of referrals and a dashboard presenting aggregated information about sentencing referrals. The data used in this memo is as of January 31, 2023.

²⁹ 15 CCR § 3076.1(a).

The below graphic shows the number of each type of resentencing referral made since 2018, which indicates that changes in the law accounted for the large majority of CDCR's referrals and also shows a significant drop in referrals overall. In particular, CDCR made 88 referrals for extraordinary conduct in 2019, 44 in 2020, 40 in 2021, and 9 in 2022 — the year the presumption in favor of resentencing became effective.

CDCR also allows judges, prosecutors, and law enforcement personnel to request that CDCR review someone for possible referral for resentencing,³⁰ but it appears that only 4 referrals of this type have been made since 2018.

CDCR resentencing referrals 2018–2022



Source: Analysis of data provided by CDCR.

Of people referred for resentencing approximately 20% had no action from a court even after three months.³¹ More than 800 people have had a sentence reduced by a court after a referral from CDCR, including 111 people for extraordinary conduct, about half of the people referred for that reason.

³⁰ 15 CCR § 3076.2(a).

³¹ Referrals made after October 31, 2023, are not included in this analysis.

According to For the People, an organization that works with prosecutors to remedy unjust sentences, approximately 350 people statewide have been resentenced after recommendations from prosecutors.³² The vast majority of the resentencings were done in counties that are also part of the resentencing pilot program.

The first report from the RAND Corporation (which is contracted to evaluate prosecutor-led resentencing) on the 9 county resentencing pilot program noted several challenges that have caused delays in resentencings, such as developing internal eligibility criteria, securing data sharing agreements with CDCR, acquiring and analyzing data to determine who meets eligibility criteria, preparation of applications, obtaining supporting documents, and identifying community-based organizations to assist with reentry.³³ Of the cases prosecutors reported reviewing, nearly half involved third-strike life sentences and nearly three-fourths had a sentence enhancement.³⁴

2. Removal of the 1 and 3 year sentence enhancements

Code Sections

Penal Code §§ 1171, 1171.1

Relevant Bill

SB 483 (2021 Allen)

Overview

In 2017 and 2019, California repealed sentence enhancements that added three years of incarceration for prior drug offenses (SB 180 Mitchell) and one year for each prior prison or felony jail term (SB 136 Wiener).

In its 2020 Annual Report, the Committee recommended retroactive application of these repeals. Beginning January 2022, SB 483 authorized courts to retroactively reduce the sentences for people serving a sentence with one of these enhancements. Counsel is assigned for these resentencings.³⁵ At these proceedings, the incarcerated person's entire sentence can be considered, including whether other sentence enhancements should continue to be imposed.³⁶

³² Data on file with Committee staff.

³³ Lois M. Davis et al, *Evaluation of the California County Resentencing Pilot Program: Year 1 Findings*, RAND Corporation, October 2022, 30–36 .

³⁴ *Id.* at 37–38.

³⁵ Penal Code §§ 1172.7(d)(5); 1172.75(d)(5).

³⁶ *People v. Monroe*, 85 Cal.App.5th 393, 402 (First District 2022).

Recent Developments

As noted in the Committee’s 2022 Annual Report, SB 483 set a March 1, 2022, deadline for CDCR and local jails to identify people in their custody who were eligible for the reduction and provide the information to the sentencing court. The list from CDCR had more than 2,000 people on it and follow-up data indicates that 28% of the eligible people had not been resentenced by the October 1 deadline and remained in custody.³⁷ Another 19% were released before resentencing could be completed. A second list of people from CDCR has more than 7,000 names on it and these people must be resentenced by December 31, 2023.³⁸

The number of people in each category who are serving their sentences in local jails is unknown, but is likely much smaller than the CDCR numbers.³⁹

3. Veterans resentencing

Code Sections

Penal Code § 1170.91

Relevant Bills

AB 865 (2018 Levine); SB 1209 (2022 Eggman)

Overview

Since 2015, courts have been required to consider “mental health problems” resulting from military service as a mitigating factor in imposing a determinate sentence.⁴⁰ In 2019, this provision was applied retroactively to people sentenced before 2015.⁴¹ Beginning in 2023, the law was expanded to any type of sentence — not just determinate ones — and those changes apply retroactively.⁴²

³⁷ This data from CDCR was provided to the Committee by the Ella Baker Center and the Office of the State Public Defender. The data was the list of people in CDCR custody as of February 16, 2022, who would have been potentially eligible for immediate release if the enhancements were removed. It included information for 2,095 separate case numbers accounting for 1,989 unique people. The analysis in this report is at the case number level, not the person level.

³⁸ Penal Code §§ 1172.7(c); 1172.75(c).

³⁹ The 1 year enhancement stopped being imposed in 2020 and the 3 year in 2018. People serving sentences in jail tend to have shorter sentences than those in prison, so many people who had sentences with the 1 and 3 year enhancement were likely released before SB 483 would have provided any relief.

⁴⁰ AB 2019 (2014 Levine), creating Penal Code § 1170.91(a).

⁴¹ AB 865 (2018 Levine), creating Penal Code § 1170.81(b0).

⁴² SB 1209 (2022 Eggman).

Recent Developments

Nationwide data from 2016 indicates that 8% of people in state prison are military veterans.⁴³ If that percentage applies to the CDCR population, more than 7,500 people in California's prison are veterans.⁴⁴ Though the group of people eligible for resentencing in California's prisons is potentially large, research by Committee staff found a general lack of awareness of the veterans resentencing law amongst practitioners. The law's expansion in 2022 to apply to people serving indeterminate sentences may significantly expand the group of people eligible for resentencing as the law now applies to people serving the longest prison sentences.

Other Laws

1. Felony murder

Code Sections

Penal Code §§ 188, 189, 1172.6

Relevant Bills

SB 1437 (2018 Skinner); SB 775 (2021 Becker)

Overview

Until SB 1437 altered the state's homicide law in 2018, California had a very broad felony-murder law, holding accomplices responsible for murders that occurred during the commission of a felony, like robbery or burglary, even if they were not present.⁴⁵ Under the new law, a person can only be convicted of murder if they were the actual killer or they aided, abetted, or assisted the actual killer.⁴⁶ It also created a legal path for those convicted of murder under the old law to petition for resentencing to a lesser crime.⁴⁷

In 2021, SB 775 allowed those with similarly invalid manslaughter or attempted murder convictions to seek resentencing.⁴⁸ It also clarified and strengthened procedural protections, including that counsel must be appointed, if requested, upon the filing of a facially sufficient petition.⁴⁹

⁴³ Laura M. Maruschak, Jennifer Bronson, and Marile Alper, *Survey of Prison Inmates, 2016: Veterans in Prison*, Bureau of Justice Statistics, Appendix Table 1 (March 2021).

⁴⁴ California Department of Corrections and Rehabilitation, Weekly Report of Population, As of Midnight March 8, 2023 (95,556 people in CDCR custody).

⁴⁵ Analysis of Assembly Committee on Public Safety, SB 1437 (Skinner), 2017-2018 Regular Session, June 26, 2018, 5-6.

⁴⁶ *Id.*

⁴⁷ Penal Code § 1172.6. The resentencing provision was originally Penal Code § 1170.95 and was renumbered without change in 2022 by AB 200 (Committee on Budget).

⁴⁸ This resolved an ongoing split in the appellate courts.

⁴⁹ Penal Code § 1172.6(b)(3).

Recent Developments

The Office of the State Public Defender reports that between January 1, 2019, and June 30, 2022, 470 people have been resentenced.⁵⁰ Approximately 77% of the resentenced people were people of color, with Black people comprising the largest share (45%).⁵¹

Some courts and stakeholders have raised concerns that the threshold for filing a facially sufficient petition is too low, resulting in a surge of resentencing requests that may not be sufficiently vetted by counsel and unnecessarily consume court resources.⁵²

2. Gang enhancements

Code Sections

Penal Code §§ 186.22 (gang enhancement); 1109 (bifurcation)

Relevant Bill

AB 333 (2021 Kamlager)

Overview

In its 2020 Annual Report, the Committee recommended narrowing the gang enhancement. At the time of the 2020 report, the Committee noted that 92% of people serving a gang enhancement were people of color. In 2021, AB 333 implemented many of the Committee's recommendations and changed to the gang enhancement, including narrowing how participation in a gang is defined, requiring that the benefit to the gang be more than reputational, and separating gang enhancement allegations from the underlying charges at trial.⁵³

AB 333 did not change the amount of time the enhancement can add, which ranges from 2 to 10 years or the imposition of a life sentence in certain circumstances.⁵⁴

Recent Developments

Several issues will need to be resolved by the California Supreme Court, which has granted review in several gang cases, four of which seek clarification on AB 333. The Court will soon consider what aspects of AB 333 apply to cases that are not yet final on appeal, what evidence is permissible to prove gang

⁵⁰ Indigent Defense Improvement Division, Office of the State Public Defender, *SB 1437/775: A Snapshot of Impact*, January 26, 2023.

⁵¹ *Id.*

⁵² See, e.g., *People v. Arreguin*, – Cal.Rptr.3d –, 2023 WL 2422082, March 9, 2023 (concurring opinion of J. Yegan).

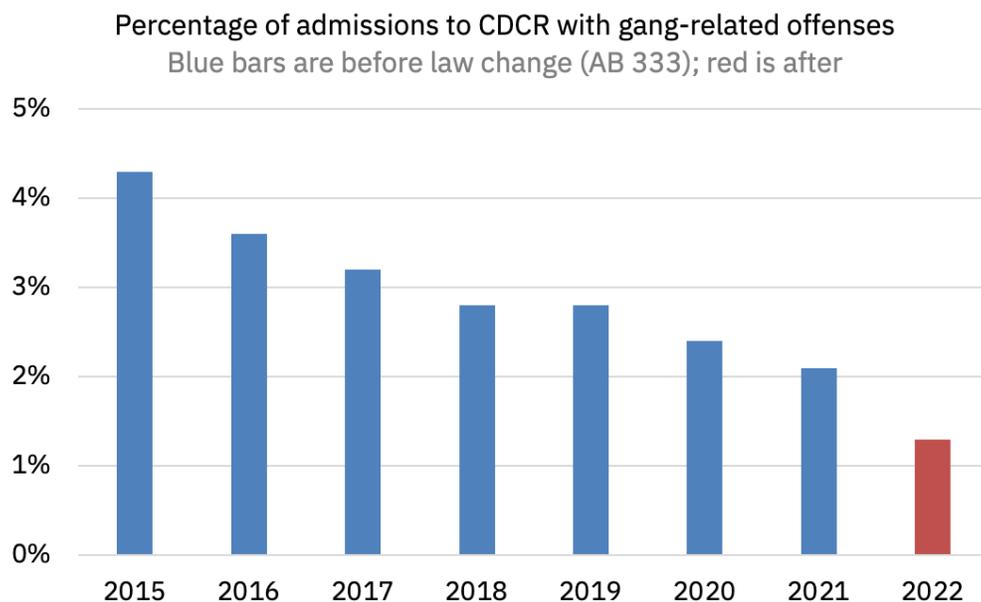
⁵³ See *People v. Tran*, 13 Cal.5th 1169, 1206 (2022) (summarizing changes made by AB 333).

⁵⁴ Penal Code § 186.22(b)(1) & (4).

enhancements, and whether the law conflicts with Proposition 21 by amending a special circumstance charge used in first-degree murder cases.⁵⁵

Based on conversations with practitioners, there has been a significant drop in the filing of gang enhancement charges in the year that AB 333 has been in effect. For example, from January 1, 2022, to November 7, 2022, in Santa Clara County, 49 cases were assigned to the gang team compared to 109 new cases in the preceding year. The District Attorney projected the year would end with a 47% decrease in cases assigned to the gang team.⁵⁶

The graphic below also shows that the proportion of people admitted to CDCR for gang-related offenses under Penal Code § 186.22 has been decreasing since at least 2015, but the drop the year that AB 333 went into effect was larger than in prior years. As noted, these results should be interpreted with caution as there may be other facts that led to this change.



Source: California Policy Lab analysis of data provided by CDCR. Gang-related offenses include enhancements under Penal Code § 186.22(b), the substantive offense in Penal Code § 186.22(a), and the sentencing provision in Penal Code § 186.22(d). All of these provisions were affected by changes in AB 333.

⁵⁵ *People v. Burgos*, 77 Cal.App.5th 550 (2022) (review granted July 13, 2022, S274743) (whether bifurcation is retroactive to cases on appeal); *People v. Cooper*, No. S273134, 2022 WL 130661 (review granted May 11, 2022) (what evidence is needed to prove that a benefit to the gang is more than reputational); *People v. Clark*, 81 Cal.App.5th 133 (2022) (review granted, October 19, 2022, S275746) (the meaning of “collectively engage in”); *People v. Rojas*, 80 Cal.App.5th 542 (2022) (review granted October 19, 2022) (AB 333 and Prop. 21).

⁵⁶ Semi-Annual Countywide Criminal Gang Activity Report, Office of the District Attorney, presented to County of Santa Clara Public Safety and Justice Committee, December 8, 2022.

3. Racial Justice Act

Code Sections

Penal Code § 745

Relevant Bills

AB 2542 (2020 Kalra); AB 256 (2022 Kalra)

Overview

The Racial Justice Act targets structural racism and bias in the criminal legal system by prohibiting the use of race, ethnicity, or national origin in seeking or obtaining convictions or in imposing sentences. It allows a person to seek dismissal of charges, or vacating of a conviction or sentence, if the charge, conviction or sentence was tainted by racial bias.

The Committee recommended in its 2021 Death Penalty Report that the Racial Justice Act be given retroactive effect. AB 256, passed in 2022, extended the RJA retroactively with a phased-in timeline for relief. The first two phases include people sentenced to death and people facing deportation (who became eligible in January 2023) and individuals in prison serving a sentence (eligible in January 2024).⁵⁷

Recent Developments

The RJA sets forth two broad paths to relief. The first requires showing actual bias or animus towards the defendant. In October 2022, in the first ruling of its kind, a judge reversed a conviction after finding that the prosecutor and a police gang expert used inflammatory and coded racial language throughout the trial.⁵⁸

The other path to relief relies on a statistical showing. A defendant must prove by a preponderance of the evidence they were charged with or convicted of more serious offenses or sentenced more severely compared to similarly situated people of a different race, ethnicity, or nationality.⁵⁹ It appears that none of these types of claims have resulted in a final decision and are instead only at the discovery stage.

While the RJA provides for discovery from law enforcement agencies after showing “good cause,”⁶⁰ district attorneys or other law enforcement agencies

⁵⁷ Penal Code § 745(j).

⁵⁸ *People v. Bryant*, No. 05-152003, Superior Court for the County of Contra Costa, October 3, 2022; Nate Gartrell, *Contra Costa Judge Rules Prosecutors Violated the Racial Justice Act During Murder Trial, Reverses Convictions*, The Mercury News, October 4, 2022.

⁵⁹ Penal Code § 745(a)(3) & (4).

⁶⁰ Penal Code § 745(d). See also *Young v. Superior Court of Solano County*, 79 Cal.App.5th 138, 144 (2022) (“good cause” is “a plausible case, based on specific facts, that any of the four enumerated

may not have the necessary data to disclose. A recent report from the Department of Justice Research Center described the lack of consistency and absence of data on important variables across the state; for example, one quarter of the 57 of 58 responding district attorney offices do not collect data on whether a plea offer was made or what the offer was.⁶¹ Another law that passed last year, the Justice Data Accountability and Transparency Act (AB 2418 (Kalra)) requires prosecutors to collect and transmit some of this data to the California Department of Justice, but that law will not go into effect until it is funded.⁶²

4. Expansion of residential reentry prison program

Code Sections

Penal Code §§ 6250–6259

Relevant Bills

AB 178 (Budget Act of 2022), Sec. 166

Overview

In its 2021 Annual Report, the Committee recommended expanding CDCR's existing residential reentry programs — the Male Community Residential Program (MCRP) and the Custody to Community Transitional Reentry Program (CCTRP). An analysis of these programs shows significant reductions in recidivism for those who complete them.⁶³

Recent Developments

These residential reentry programs currently house 1,000 people.⁶⁴ California's 2022 Budget committed \$120 million in funding for expanding these programs over three years and CDCR has taken steps to begin opening facilities in additional counties.⁶⁵

violations of [the Racial Justice Act] could or might have occurred" and requires a court to balance additional factors).

⁶¹ Department of Justice Research Center, Presentation for the Task Force to Study Reparations Proposals for African Americans Public Hearing, March 3, 2023.

⁶² This law also created the Prosecutorial Transparency Advisory Board to assist in implementation of the law. The Chair of the Committee on Revision of the Penal Code is included as a member. Penal Code § 13370(b)(1)(F)(v).

⁶³ Kimberly Higuera, Garrett Jensen, and Emily Morton, *Effects of the Male Community Reentry Program (MCRP) on Recidivism in the State of California*, Stanford Public Policy Program, June 2021.

⁶⁴ California Department of Corrections and Rehabilitation, Weekly Report of Population, As of Midnight, March 8, 2023 (310 in CCTRP and 690 in MCRPs); CDCR, Three-Judge Court Quarterly Update, B.4–5, December 15, 2022 (noting that MCRPs are in San Diego, Los Angeles, Kern, and Butte Counties and CCTRPs are in San Diego, Santa Fe Springs, Bakersfield, Stockton, Sacramento, and Los Angeles).

⁶⁵ Governor's January Budget Summary – 2023–24, Criminal Justice, 85; CDCR, Request for Information: Male Community Reentry Program, August 31, 2022.

Practices in Other Jurisdictions

Federal court resentencings

Recent retroactive sentencing reforms at the federal level have largely operated more efficiently despite encountering similar challenges to courts in California.

- In 2014, the United States Sentencing Commission voted unanimously to reduce the presumptive sentence for drug trafficking offenses, often referred to as the “Drugs Minus Two Amendment,” which was also voted to give retroactive effect.⁶⁶ By June 2015, less than one year after the effective date, courts had resolved more than 12,000 petitions, granting 79% of them.⁶⁷ By 2021, courts resolved more than 50,000 motions, granting more 31,000 of them (63%).⁶⁸
- The Fair Sentencing Act of 2018 expanded the use of “compassionate release” to include any “extraordinary and compelling reasons” for reducing a sentence.⁶⁹ Courts resolved more than 27,000 motions by September 2022 and granted 16% (4,502) of them.⁷⁰

Part of the success in federal court was due to the appointment of counsel, which ensured people in prison had adequate representation. While federal law did not require the appointment of counsel in these circumstances, many district courts, including the district courts in California, issued general orders appointing the federal defender to represent any person previously determined to have been entitled to appointment of counsel. The federal defender was responsible for determining whether persons qualified for relief and then presenting any petition on their behalf.⁷¹

Unsurprisingly, systemic appointment of counsel appears to have meaningfully increased relief. For example, the federal district court in Oregon assigned the federal defender in most cases, resulting in a 65% grant rate, while the Western

⁶⁶ United States Sentencing Commission, *2014 Drug Guidelines Amendment, Retroactivity Data Report*, 1–2, December 2015.

⁶⁷ *Id.* at Table 1.

⁶⁸ The early release did not increase recidivism. A United States Sentencing Commission study found no statistically significant difference between the recidivism rates for people convicted of drug trafficking who had served their full sentences and those who received a sentence reduction. United States Sentencing Commission, *Retroactivity and Recidivism*, 2–6, July 2020.

⁶⁹ 18 U.S.C. § 3582(c)(1)(A)(i)

⁷⁰ United States Sentencing Commission, *Compassionate Release Data Report*, Table 1, December 2022.

⁷¹ See, e.g., *In the Matter of Appointment of Counsel in Criminal Cases Potentially Affected by Johnson v. United States*, 135 S. Ct. 2551 (2015), General Order No. 649, S. D. Cal., December 8, 2015; *In re: First Step Act of 2018* (Dec. 21, 2018), Application of Fair Sentencing Act of 2010, Misc. Order, N. D. Cal., January 25, 2019 (amended April 27, 2020)

District of Oklahoma, which did not appoint counsel, had a grant rate of less than 4%.⁷²

The First Step Act of 2018 also contained a provision that required the Bureau of Prisons to “assist the defendant in the preparation, drafting, and submission of a request for a sentence reduction,”⁷³ which eliminated delays in obtaining institutional records. Some courts also issued standing orders that required disclosure of sealed records to counsel, such as presentence reports, and notification to the federal defender of any pro se motions requesting resentencing relief.⁷⁴

Second-Look Sentencing

In its 2020 Annual Report, the Penal Code Committee recommended a universal second-look resentencing law that would allow any incarcerated person who had served 15 years to petition for relief. Though no jurisdiction currently has such a law, a Resentencing Task Force in Illinois recently recommended that the state legislature create a second look pathway to judicial review for people who can show that the sentence no longer advances the interest of justice or the promotion of public safety.⁷⁵

In Washington, DC, the Incarceration Reduction Amendment Act of 2016 allowed people under the age of 18 when they committed serious crimes to petition for resentencing after serving 20 years in prison. The Second Look Amendment Act of 2019, which went into effect in April 2021, expanded resentencing to people who were under the age of 25 at the offense and had served a sentence of at least 15 years.⁷⁶ In 2021, Maryland also passed a law allowing people who were under 18 at the offense and who have served 20 years to ask for resentencing.⁷⁷

⁷² Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN, September 30, 2021.

⁷³ 18 U.S.C. § 3582(d)(2)(A)(iii).

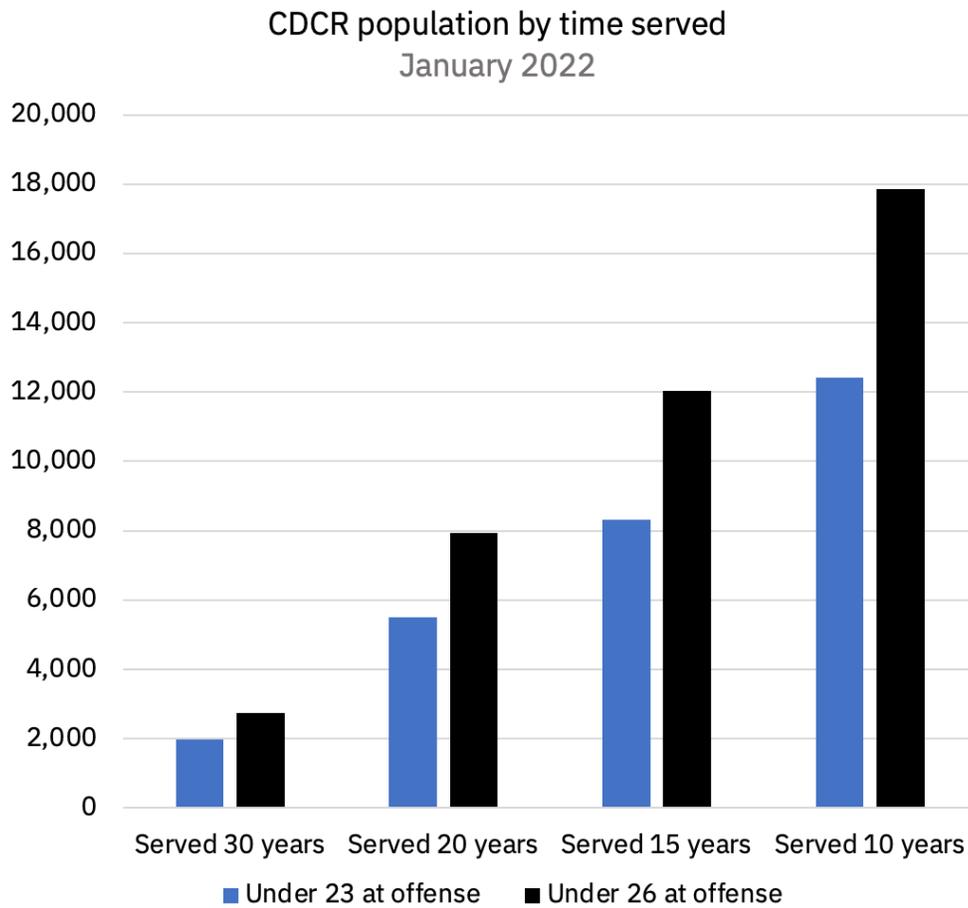
⁷⁴ See, e.g., In the Matter of Appointment of Counsel and Access to Sealed Documents in Criminal Cases Potentially Affected by *Johnson v. United States*, 135 S. Ct. 2551 (2015), General Order No. 15-08, C.D. Cal., October 30, 2015; In the Matter of Appointment of Counsel and Access to Sealed Documents in Criminal Cases Potentially Affected by the First Step Act, General Order No. 19-11, C.D. Cal., October 22, 2019.

⁷⁵ Illinois Resentencing Task Force, *Final Report*, 12 (December 2022).

⁷⁶ See *DC Council Passes Second Look Amendment Act of 2019*, District of Columbia Corrections Information Council, May 19, 2019.

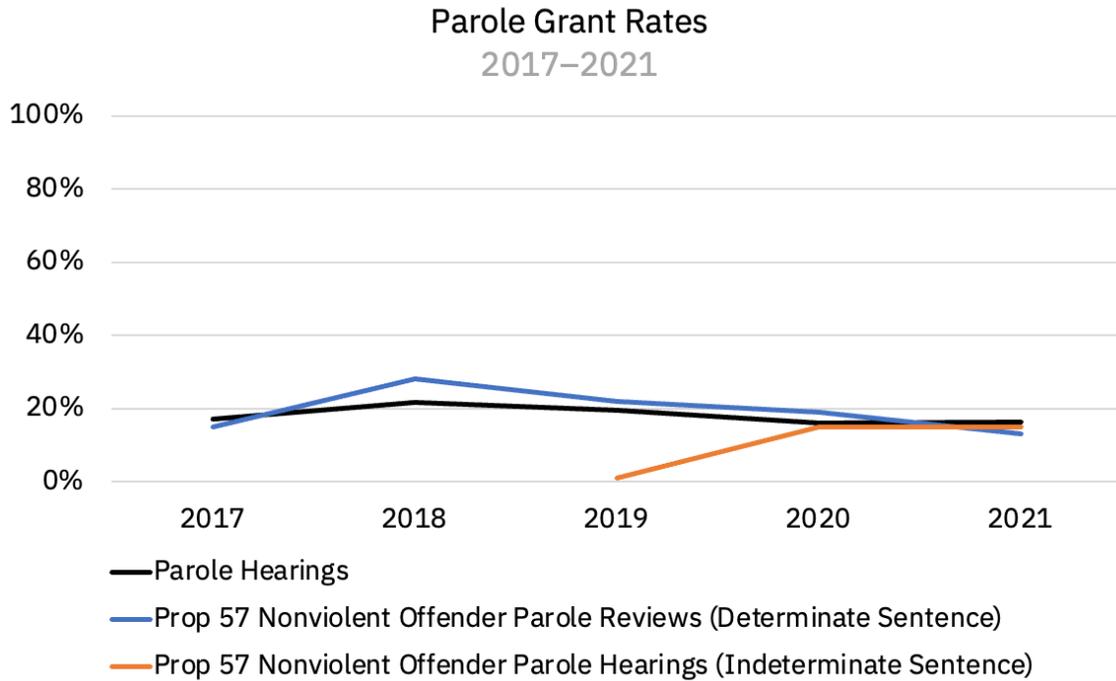
⁷⁷ Maryland Code of Criminal Procedure § 8-110.

A similar age-based approach in California would make more than 10,000 people eligible for sentencing, as explored in the this graphic:



Source: California Policy Lab analysis of data provided by CDCR. People serving capital and life without parole sentences are included in this analysis.

The Committee’s consideration of second-look sentencing may also benefit from an overview of the rate at which people are granted parole in California. The next graphic shows the grant rates for people considered under Proposition 57’s nonviolent offender parole review process and traditional parole hearings. The grant rates in 2021, the most recent year of data, are all well under 20%.



Source: California Board of Parole Hearings, *Reports of Significant Events*. For the Parole Hearings category, the grant rate is the percentage of parole grants of all scheduled hearings. The grant rate for Prop 57 determinate sentence reviews includes modifications after review. BPH did not begin reviewing people with indeterminate sentences for a nonviolent offense — i.e. those serving a life sentence under the Three Strikes law for a nonviolent offense — until 2019.

Areas for Further Exploration

The Committee may wish to consider the following proposals to address the issues raised in this memorandum.

- **Specify general resentencing procedures.** For more than a decade, California has allowed large numbers of incarcerated people to return to court to have their sentences reconsidered. However, there are no general rules for procedures to follow for resentencings — and each new reform often comes with some distinct rules — resulting in wide variation across the state in how resentencings are handled. The Penal Code could specify general procedures for resentencings, including appointment of counsel; regular meetings in each county between prosecutors, defense counsel, the courts, CDCR, and other stakeholders to establish clear ways to obtain records and other information for resentencings; and timeframes for courts to send documents about newly-imposed sentences to CDCR.
- **Retroactive application of judicial discretion to strike “nickel” priors.** For more than three decades, judges lacked the power to dismiss the 5 year “nickel” prior enhancement. Data indicates that many nickel priors are appropriate for dismissal in the interest of justice. People who are serving a sentence lengthened by a nickel prior imposed during the time that judges did not have the discretion to dismiss it should have the opportunity to have the enhancement struck from their sentence, as allowed for people sentenced today.
- **Expand “second look” sentencing.** In its 2020 Annual Report, the Committee recommended expanding second look sentencing to allow any person who has served more than 15 years to request reconsideration of a sentence.

Conclusion

The Committee should consider what additional changes to the law will advance its goals of improving public safety and equity while reducing unnecessary incarceration and racial disparities.

Respectfully submitted,

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Appendix: Summary of Recent Law Changes

Relevant Bill	Penal Code	Summary
Judicial Discretion in Sentencing		
SB 567	§ 1170	Sets the middle term as the presumptive sentence and requires any factor that elevates the sentence be admitted or proven beyond a reasonable doubt
SB 81	§ 1385	Created guidance on discretion to strike enhancements in interests of justice
SB 1393	§ 667	Restores discretion to dismiss 5-year prison priors
SB 620	§§ 12022.5; 12022.53	Restores discretion to dismiss certain gun enhancements
Resentencing Provisions		
AB 1812; AB 1540	§ 1172.1	Law enforcement-initiated resentencing: Expands referral power to prosecutors and gives further guidance to courts and procedural protections
SB 483	§§ 1171; 1171.1	Makes repeal of 1 and 3-year enhancements retroactive
AB 865; SB 1209	§ 1170.91	Allows resentencing of veterans if mental health issues resulted from military service.
Other Laws		
SB 1437; SB 775	§§ 188; 189; 1172.6	Redefines accomplice liability for felony murder
AB 133	§ 186.22	Narrows the scope of the gang enhancement
AB 2542; AB 256	§ 745	Racial Justice Act: Prohibits the use of race, ethnicity, or national origin in obtaining a conviction or in sentencing